

**BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA**

FILED

OCT 03 2007

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY

IN THE MATTER OF A MEMBER
OF THE STATE BAR OF ARIZONA

) File No. 06-1747
)
)

MICHAEL L. LYNCH,
Bar No. 013046

) **HEARING OFFICER'S REPORT**
)
)

RESPONDENT
_____)

PROCEDURAL HISTORY

- 1 This matter came before this Hearing Officer as a result of a direct file of a Joint Memorandum in Support of Agreement for Discipline by Consent and a Tender of Admissions, both of which were filed on July 26, 2007. The matter was assigned to this Hearing Officer on July 27, 2007, and a hearing on the agreement was held on September 6, 2007.

FINDINGS OF FACT

- 2 At all times relevant hereto, Respondent was a lawyer licensed to practice law in the State of Arizona, having first been admitted on February 5, 1991.

COUNT ONE (File No. 06-1747)

3. This matter involves, initially, the Respondent failing to comply with Mandatory Continuing Legal Education ("MCLE") requirements, and subsequently being suspended for that non-compliance. He thereafter was reinstated, but practiced law for a period of time while he was on suspension status.
4. On or about February 2004, Respondent received an extension to February 29, 2004, to complete his MCLE requirement for the year 2002-2003.

5. On or about February 29, 2004, Respondent completed his mandatory fifteen hours, but was lacking one of the required three hours of ethics
6. On March 18, 2004, the Board of Governors of the State Bar of Arizona ("State Bar") approved Respondent's name for summary suspension for failure to comply with MCLE requirements.
7. The State Bar notified Respondent of the suspension by letter dated March 29, 2004. Respondent was notified that he lacked one hour of ethics credit and was told that once he got his needed hour, he could apply for reinstatement by:
 - a. Requesting reinstatement in writing
 - b. Providing an Affidavit of Compliance with Rule 45, Ariz.R.Sup Ct.
 - c. Furnishing a proof of cure in the form of an attendance certificate of one hour of ethics legal education.
 - d. Paying \$100.00
8. On or about June 27, 2004, Respondent completed the needed one-hour of ethics legal education
9. On or about September 27, 2004, Respondent submitted his affidavit of compliance and applied for reinstatement pursuant to Rule 64, Ariz.R.Sup.Ct. However, because Respondent waited more than sixty days to apply for reinstatement following the expiration of his period of suspension, he was obligated to utilize the more extensive application procedure pursuant to Rule 65, Ariz R Sup.Ct.
10. On October 25, 2004, Respondent was reinstated. However, from March 1, 2004, through October 25, 2004, Respondent continued to practice law while summarily

suspended for the MCLE violation. Respondent appeared as attorney of record in at least six cases, filing several motions and pleadings with the Maricopa County Superior Court. Additionally, he continued to represent clients in thirty-five other cases during the suspension

11. On May 24, 2006, as a result of Respondent's conduct between March 1, 2004, and October 25, 2004, Respondent was suspended for ninety days and placed on probation for a period of one year for violating Rule 42, Ariz R Sup Ct, specifically ERs 5 5, 8.4(a) and (d), and Rule 31(b).
12. On October 3, 2006, Respondent appeared in court for a hearing before Superior Court Judge Michael O. Wilkerson who advised Respondent that he was still listed as suspended from the practice of law
13. On or about October 3, 2006, Respondent spoke with ex-staff bar counsel Clarence Matherson. Mr. Matherson informed Respondent that he needed to comply with the reinstatement requirements of Rule 64(e)(2)(A), Ariz R Sup Ct. This is the same rule with which Respondent failed to comply after curing his MCLE violation that resulted in his 90-day suspension in the first place
14. Respondent asserts that he did not realize he had to reapply for reinstatement; rather, he believed he could simply resume his practice on the ninety-first day after his ninety-day suspension
15. Respondent took immediate steps to notify his clients, opposing counsel and the courts.
16. By letter dated October 3, 2006, Respondent provided a list of then-pending clients and cases, an accounting of all client activities from September 25, 2006,

through October 3, 2006, relevant copies of Motions to Withdraw in every case that was not yet concluded and Notices of Withdrawal in cases that were concluded.

17. Respondent filed a Motion for Reinstatement with the Supreme Court, and on November 2, 2006, the Court issued an Order of Reinstatement.
18. From September 26, 2006, through October 3, 2006, during Respondent's suspension, Respondent participated in three litigated cases and met with a client in a fourth matter
19. Respondent practiced law in Arizona in violation of the regulation of the legal profession in Arizona.
20. Respondent practiced law in Arizona while on suspension

CONCLUSIONS OF LAW

21. The Hearing Officer finds that there is clear and convincing evidence that Respondent practiced law in the State of Arizona while his license was on suspension. This conduct is in violation of Rule 42, Ariz R.Sup.Ct., ER 5.5(a), and Rule 31(c).

ER 5.5(a) Unauthorized Practice of Law

Rule 31 Regulation of the Practice of Law
(c) Restrictions on Suspended Attorney

CONDITIONAL ADMISSIONS

22. Respondent conditionally admits that his conduct violated Rule 42, Ariz.R.Sup.Ct., specifically ER 5.5(a), and Rule 31(c).

ABA STANDARDS

23. In determining the appropriate sanction, the Hearing Officer considered both the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("Standards") and Arizona case law. The *Standards* provide guidance with respect to an appropriate sanction in this matter. The Supreme Court and Disciplinary Commission consider the *Standards* a suitable guideline. See *In re Peasley*, 208 Ariz. 27, 33, 35, 90 P.2d 764, 770, 772 (2002); *In re Rivkind*, 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990). The *Standards* do not account for multiple charges of misconduct. The ultimate sanction imposed should be at least consistent with the sanction for the most serious instance of misconduct among a number of violations. *Standards*, p. 6; *In re Redeker*, 177 Ariz. 305, 868 P.2d 318 (1994).
24. In determining the appropriate sanction, the Supreme Court and the Disciplinary Commission consider the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and mitigating factors. See *Peasley*, 208 Ariz. at 35, 90 P.2d at 772; *Standard 3.0*.
25. The Hearing Officer finds that Respondent negligently failed to complete his MCLE and then, after his suspension, applied for reinstatement under the wrong Rule (Rule 64, Ariz. R. Sup. Ct.) when he should have applied under Rule 65, Ariz. R. Sup. Ct. Because of this omission, Respondent practiced law from September 25, 2006, through October 3, 2006, 9 days, while on suspended status. The Hearing Officer finds that Respondent's conduct falls within *Standard 7.0*, specifically *Standard 7.3*.

Standard 7.3 provides

Reprimand (censure in Arizona) is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system

26. Based upon Respondent's admissions, the presumptive sanction under the *Standards* is censure

A) DUTY VIOLATED

27. The Hearing Officer finds that Respondent violated his duty to his clients, the legal system and to the profession by failing to comply with the ethical rules Respondent negligently practiced law in Arizona in violation of the regulation of the legal profession in Arizona and practiced law in Arizona while suspended

B) ATTORNEY'S MENTAL STATE

28. The Hearing Officer finds that Respondent negligently practiced law in Arizona in violation of the regulation of the legal profession in Arizona and practiced law in Arizona while suspended, when Respondent: 1) failed to comply with the reinstatement requirements of Rule 64(e)(2)(a), Ariz.R Sup.Ct., after completing the ninety day suspension ordered in File No. SB-06-0042-D; 2) participated in three litigated cases, and 3) met with a client in a fourth matter.

C) THE POTENTIAL OR ACTUAL INJURY CAUSED BY RESPONDENT'S CONDUCT

29. The Hearing Officer finds that Respondent's conduct in failing to comply with State Bar MCLE requirements and continuing to practice law while on suspension, exposed his clients to potential injury

D) AGGRAVATING AND MITIGATING FACTORS

Aggravating Factors:

30. The Hearing Officer finds the following two aggravating factors

Standard 9.22(a) – Prior disciplinary offenses. Respondent was previously summarily suspended for MCLE non-compliance on June 14, 2000, and reinstated on August 9, 2000. By judgment and order of the Supreme Court in File No SB-06-0042-D, Respondent was suspended for ninety days and placed on probation for a period of one year for violating Rule 42, Ariz.R.Sup Ct , specifically ERs 5.5, 8.4(a) and (d), and Rule 31(b).

Standard 9.22(1) – Substantial experience in the practice of law, sixteen years. Respondent has been practicing law in the State of Arizona since February 5, 1991.

Mitigating Factors:

31. The Hearing Officer finds the following mitigating factors:

Standard 9.32(b) – Absence of a dishonest or selfish motive.

Standard 9.32(d) – Timely good-faith effort to make restitution or to rectify consequences of misconduct

Standard 9.32(e) – Full and free disclosure to disciplinary board or cooperative attitude toward proceedings. Throughout the course of the investigation and formal process, Respondent has been forthcoming and cooperative. He has made full and free disclosure and his actions should be considered as mitigating the misconduct

Standard 9.32(1) – Remorse Respondent has expressed and demonstrated remorse for his actions and the consequences thereof.

RESTITUTION

32. There is no restitution to any client/party in this matter. Respondent has paid his fees for readmission and is ordered herein to pay the costs of these proceedings

PROPORTIONALITY REVIEW

- 33 To have an effective system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. *Peasley, supra*, 208 Ariz. at paragraph 33, 90 P.3d at 772. However, the discipline in each case must be tailored to the individual case, as neither perfection nor absolute uniformity can be achieved, *Id.* at 208 Ariz. at paragraph 61, 90 P.3d at 778 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002), *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).
34. The most serious instance of misconduct in this case involves Respondent's practicing law in Arizona in violation of the regulation of the legal profession in Arizona, and practicing law in Arizona while suspended. The following cases are instructive concerning these types of misconduct:
- 35 ~~In~~ *In re Rodgers*, SB-04-0136-D (2004), Rodgers continued to practice law while suspended for failing to comply with MCLE requirements. Upon learning of his suspension, Rodgers tried to locate documentation of his MCLE but was unable to do so. He began taking MCLE, and after three months completed the required

hours and was reinstated. While suspended, Rodgers attended several preliminary hearings, participated in several scheduling/discovery conferences and filed an amended complaint. Rodgers was not questioned about his membership status and did not affirmatively misrepresent his status to the court.

36. There was one (1) aggravating factor present in *Rodgers*: substantial experience in the practice of law. There were five (5) mitigating factors present: absence of a prior disciplinary record, personal or emotional problems, full and free disclosure to the disciplinary board or cooperative attitude toward proceedings, character or reputation and remorse. Rodgers received a censure for violating Rule 42, Ariz R Sup Ct., specifically ERs 5.5(a) and 8.4(c) and (d).

37. In *In re Brown*, SB-03-0143-D (2003), Brown continued to practice law while suspended for failing to comply with MCLE requirements. During the period of suspension Brown moved from Tucson to Yuma and began working as an attorney for the Yuma Public Defender's Office. Brown engaged in the unauthorized practice of law for four months by representing criminal defendants. Brown failed to provide the State Bar with his forwarding address, failed to promptly respond to the State Bar's investigation, and failed to timely comply with reasonable requests for additional information.

38. There were three (3) aggravating factors present in *Brown*: prior disciplinary offenses, bad-faith obstruction of the disciplinary proceeding, and substantial experience in the practice of law. There were four (4) mitigating factors present: absence of a dishonest or selfish motive, personal or emotional problems, character or reputation, and imposition of other penalties or sanctions. Brown

received a censure with one year of probation with participation in the State Bar's Law Office Management Assistance Program ("LOMAP") for violating Rule 42, Ariz R.Sup.Ct., specifically ERs 5.5, and 8 4(c) and (d), and Rule 51(b), (e), (f), (h) and (i), Ariz R Sup.Ct

39. In *In re Blake*, SB-03-0022-D (2003), Blake was summarily suspended ("1st suspension") for one month for nonpayment of dues and was subsequently summarily suspended ("2nd suspension") for seven months for noncompliance with MCLE requirements. During both suspensions Blake continued to practice law. On behalf of one client, Blake gave legal advice, wrote letters and engaged in settlement negotiations with an insurance company. For another client he gave legal advice and filed a lawsuit. Blake also represented clients as an associate for the firm he worked for, appearing at a number of hearings and represented approximately twenty clients. Blake asserted he was unaware of the 1st suspension and admits he knowingly practiced law during the 2nd suspension. Blake self reported to the State Bar.

40. There were no aggravating factors present in *Blake*. There were eight (8) mitigating factors present: absence of a prior disciplinary record, absence of a dishonest or selfish motive, personal or emotional problems, timely good-faith effort to make restitution to rectify consequences of his misconduct, full and free disclosure to a disciplinary board or cooperative attitude toward proceedings, character or reputation, physical or mental disability or impairment, and remorse. Blake received a censure with one year of probation with participation in the State Bar's Member Assistance Program ("MAP") and fee arbitration for violating Rule

42, Ariz R Sup Ct., specifically ERs 3 4(c), 5 5 and 8 4(c) and (d), and Rules 31(a)(3) and 51(f), Ariz R Sup Ct.

41. In *In re Gwilliam*, SB-03-0004-D (2003), Gwilliam failed to properly file his MCLE affidavit and did not cure the deficiency after being summarily suspended for MCLE non-compliance. While summarily suspended for fifteen months, Gwilliam continued to practice law by representing a litigation client in the trial and appellate courts. He was listed as co-counsel on a stipulation, filed a response and cross-motion, earned \$2,240.00 in connection with his work on the litigation, prepared and filed papers concerning a bond issue, appeared and argued the bond issue to the trial court, negotiated on behalf of the litigation clients, and appeared with co-counsel before the Court of Appeals. Gwilliam failed to inform his litigation clients, co-counsel, the trial court, the Court of Appeals or opposing counsel of his suspension. He also failed to cooperate with the State Bar's investigation until after the formal complaint was filed.

42. There was one (1) aggravating factor present in Gwilliam's prior disciplinary offenses. There were five (5) mitigating factors present: personal or emotional problems, absence of a selfish or dishonest motive, timely good-faith effort to rectify consequences of misconduct, cooperative attitude, and remorse. Gwilliam received a censure for violating Rule 42, Ariz.R.Sup.Ct., specifically ERs 5 5(a), 8 1 and 8 4(a), and Rules 31(a)(3), 33(c) and 51(h), Ariz R.Sup.Ct.

43. In this case, Respondent practiced law in Arizona in violation of the regulation of the legal profession in Arizona and practiced law in Arizona while suspended. The Supreme Court "has long held that 'the objective of disciplinary proceedings

is to protect the public, the profession and the administration of justice and not to punish the offender ' " *In re Alcorn*, 202 Ariz 62, 74, 41 P.3d 600, 612 (2002) (quoting *In re Kastensmith*, 101 Ariz 291, 294, 419 P.2d 75, 78 (1966))

44. The Hearing Officer concurs that the recommended sanction set forth below is consistent with the cases set forth herein

RECOMMENDATION

45. The State Bar and Respondent submit that the following disciplinary sanction is appropriate, and this Hearing Officer concurs:

1. Respondent will receive a censure for violating Rule 42, Ariz R Sup Ct., specifically, ER 5.5(a) and Rule 31(c), Ariz.R.Sup.Ct.
2. Respondent shall pay all costs incurred by the State Bar in connection with these proceedings. Costs to date are \$600 00 Respondent will be responsible for any further costs incurred in this matter, and costs will be paid by Respondent within 30 days of the Supreme Court's final Judgment and Order pursuant to Ariz.R Sup.Ct., 60(b)

DATED this 3rd day of October 2007

H. Jeffrey Coker /cs
H Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this 3rd day of October 2007

Copy of the foregoing mailed
this 3rd day of October, 2007, to.

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